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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 319

MISSISSIPPI VALLEY BARGE LINE COMPANY, ET AL.,
Appellees,

v.

UNITED STATES OF AMERICA ET AL. (Pittsburgh Towing Company), *Appellant*

On Appeal From the United States District Court for the Eastern District of Missouri—Eastern Division

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court is reported at 252 F. Supp. 162 (Appendix "A"). The report of the Interstate Commerce Commission is reported at 324 I.C.C. 460 (Appendix "B").

JURISDICTION

This action was brought under 28 U.S.C. 1336, 1398 and 2321-2325 to vacate, set aside, and annul an order of the Interstate Commerce Commission. The Order of the three-judge district court was entered on March 25, 1966 (p. 10a). Appellants filed notice of appeal in the district court on April 15, 1966. The jurisdiction of this Court to review the district court's judgment by direct appeal is conferred by 28 U.S.C. 1253 and 2101 (b).

THE FOLLOWING QUESTIONS ARE PRESENTED BY THIS APPEAL

1. Whether the Court erred in its finding, judgment and decree that the determination of Defendant Interstate Commerce Commission in Docket No. 21193 was not supported by substantial evidence or was induced by misapplication of the law.

2. Whether the Court erred in its finding, judgment and decree that the appellant, Intervenor Pittsburgh Towing Company, failed to meet the requirements of Defendant Interstate Commerce Commission regulations set forth in 49 C.F.R. 306.1 through 306.10 and part 3 of the Interstate Commerce Act, 49 U.S.C. Section 901 et seq.

3. Whether the Court erred in its finding, judgment and decree that proceedings for transfer of Water Carrier Certificate W-364 were for the purpose of circumventing regulations of Defendant Interstate Commerce Commission.

4. Whether the Court erred in its finding, judgment and decree that Defendant Interstate Commerce Commission violated and ignored its own rules in the ap-

plication and proceedings for transfer of Water Carrier Certificate W-364.

5. Whether the Court erred in failing to remand this cause to the Interstate Commerce Commission for further proceedings.

STATUTES AND REGULATIONS INVOLVED

Section 312 of the Interstate Commerce Act, 49 U.S.C. § 912, provides for the transfer of previously-issued water carrier certificates:

> Section 312. Except as provided in this part, any such certificate or permit may be transferred in accordance with such regulations as the Commission shall prescribe for the protection of the public interest and to insure compliance with the provisions of this part.

Pursuant to the above statutory authority, the Commission has prescribed detailed regulations governing the transfer of water carrier certificates. These regulations are published at 49 C.F.R. 306.

The regulation pertinent to the instant case is quoted in the opinion, Appendix "A".

At the time the decision of the Commission was issued, the Commission had no statutory authority to revoke a water carrier certificate under any circumstances. Subsequently, on September 6, 1965, Congress enacted Section 312a of the Interstate Commerce Act, 49 U.S.C. § 912a, which provides:

> "Sec. 312a. (1) Certificates and permits shall be effective from the date specified therein, and shall remain in effect until suspended or revoked as provided in this section.

"(2) Any certificate or permit issued under this part may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may, upon complaint, or on the Commission's own initiative, after reasonable notice and opportunity for hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with the provisions of section 305(a) with respect to performing, providing, and furnishing transportation upon reasonable request therefor: *Provided, however,* That no such certificate or permit shall be suspended, changed, or revoked under this paragraph (except upon application of the holder) unless the holder thereof, fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 304 (e) of this title, commanding obedience to the provisions of section 305(a) with respect to performing, providing, and furnishing transportation upon reasonable request therefor."

STATEMENT OF CASE

On July 8, 1960 an application was filed with the Commission for transfer of a water carrier certificate, W364, then held by Charles Zubik to the Pittsburgh Towing Company. The application, Docket F 21193, was in the form specified by the Commission's regulations (49 C.F.R. 306.3), and notice of the filing of the application was sent by letter to all known competitors of the transferor, including the plaintiffs in this court proceeding, and the Governors of the adjacent states.

No protests to the application were timely filed, and on September 9, 1960, Division 4 of the Commission approved the transfer, subject to the transferee's filing,

within 20 days after consummation, a copy of the instrument by which the operating rights were conveyed and an opinion of counsel as to the fact of legal consummation. On November 17, 1960, such notice and opinion were filed with the Commission, and sometime that month Pittsburgh Towing Company commenced operations.

On October 24, 1960, the plaintiffs filed with the Commission a petition for leave to intervene and to file a petition for rehearing and reconsideration. That petition was denied on December 30, 1960.

On January 4, 1961, *after* the transfer had been consummated, plaintiffs filed an amendment to their prior petition for leave to intervene, etc., alleging that Zubik had misrepresented to them the nature of the transfer. This was followed on February 8, 1961, by a new petition for reconsideration. The Commission, in an order served October 10, 1961, concluded:

> That, upon consideration of the petition for reconsideration filed February 8, 1961, and the reply thereto, there has been presented sufficient justification to warrant reconsideration of the order of the Commission, Commissioner Tuggle, dated December 30, 1960:

The order of the Commission further provided:

> That the proceeding be, and it is hereby reopened for further consideration and assigned for hearing * * *.

Following a full (four day) hearing before a Commission examiner in which the Commission's own Bureau of Inquiry and Compliance was directed to appear, and after the submission of briefs, the examiner

issued his recommended report and order, recommending that the transfer be disapproved and set aside. On exceptions, however, Division 3 of the Commission, with Commissioner Murphy dissenting, disagreed with the examiner and concluded that its prior approval of the transfer should be affirmed. Petitions for reconsideration were denied on January 3, 1964, by Division 3, Acting as an Appellate Division.

On January 7, 1964, plaintiffs filed a complaint in this proceeding, seeking to have the order of Division 3 annulled and set aside. Subsequent thereto the Commission, Division 3, on its own motion reopened the proceeding for reconsideration, and withheld issuance of the certificate to transferee pending reconsideration. Because of the policy matters involved, the proceeding was recalled from the Division by the entire Commission.

The new report and order of the entire Commission, with four Commissioners dissenting, was issued on March 19, 1965. The entire Commission, after full consideration of the record and the policy questions involved, concluded that its prior approval of the transfer should not be set aside.

Plaintiff's amended complaint was filed in this proceeding on or about June 14, 1965.

THE QUESTIONS ARE SUBSTANTIAL

Preservation of the policies of Congress in giving to the Commission such broad and exclusive powers in transfer cases, is vital to the public interest. When this statutory District Court granted a permanent injunction against the transfer of the Certificate W 364 to this appellant without remanding the case to the Com-

mission, the Court usurped the powers of the Commission.

District Courts may not lawfully exercise the powers given, exclusively, to the Commission. The Commission could have ordered a further hearing to correct any errors.

The memorandum opinion of the Court below, filed February 18, 1966, is quite broad in scope, but the judgment and decree filed March 25, 1966, from which this appeal is taken, does not follow the opinion and is predicated upon one single error. This single error is completely within the discretion of the Commission.

CONCLUSION

For the reasons stated and the questions presented by this appeal which are substantial and are of public importance, it is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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